No. 13,658

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON H. OLENDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S CLOSING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Texts

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APPELLANT'S CLOSING BRIEF.

An accurate statement of the evidence and of each witness' testimony is contained in our Opening Brief from pages 3-71. The Government's short summary of the evidence contains many misstatements of fact and many statements which are but the mere conclusions of the writer. We here discuss some of these inaccuracies, leaving others to be dealt with in the following arguments.

On page 5 appellee states that appellant, according to his own statement, supervised the maintenance of the books himself, referring to pages 222-4 of the record where Government Agent Root testified that Olender so told him. However, both of the part-time bookkeepers

for Olender testified that Olender did not dictate any bookkeeping policy to them; that Olender was never consulted on how to account for entries nor how to post the books; that Olender did not make any entries in the books nor tell them how to make any such entries. (Testimony of Vera Manger, R. 823-828; testimony of Virginia Busby, R. 842-5.)

On page 17 the Government states that as to the Money-Back-Smith transaction, appellant could produce no receipt to show his payments. The Government makes no reference to the fact that Mr. Lorenzen of the Money-Back-Smith establishment produced the receipted invoices showing payment in 1944 nor to the checks showing payment to have been made in 1944. (Defendant's Exhibits AM and AM-1.)

On page 18 the Government states that appellant borrowed $30,000 and then $10,000 from the bank when he allegedly had large sums in his safe deposit box. The Government fails to mention that the $30,000 loan was made in July of 1945 and the $10,000 loan in August of 1946 (R. 1153-4) or that appellant deposited $32,000 in United States bonds as security for the first loan and $10,000 in United States bonds as security for the second loan.

On page 18 the Government argues that none of the Goodman invoices that were located established a tie between the 322 sailor suits and the $25,550 in cashier's checks sent to Goodman and that this left the transaction largely dependent on the testimony of appellant. Reference is made to pages 1169-1205 of the record. These

pages cover part of the testimony of the Revenue Agent Root. He testified that he had received some Goodman invoices from Special Agent Blanchard in 1948. (R. 1172.) He further testified that he did not know whether the invoices represented the same transactions evidenced by the Goodman cashier's checks (R. 1174) but that he could not say they were not of the same transaction (R. 1174). The Government further argued that this indicated there had been other deals with Goodman which were not entered on the books of the store. There was no evidence to this latter effect and Root's statement that he did not know whether or not the invoices related to the cashier's checks certainly cannot be construed into meaning there was no relation between the invoices and the checks.

On page 19 the Government argues that Agent Whiteside's investigation of appellant's mother's bank accounts showed that most of the withdrawals were redeposited in other accounts of the mother. Appellant testified that he thought the gifts from his mother came from her bank accounts on the specified dates but it may have come from some other source. (R. 464-5.) The record shows that some of these withdrawals were deposited in the bank account of appellant's sister (R. 932, 1101); clearly this indicates that the mother was making equal gifts to her two children.

INSUFFICIENCY OF THE EVIDENCE.

The Government concedes that the chief disputed issues were (1) Whether appellant had $50,000 or $72,000 in cash as of December 31, 1944; (2) Whether appellant was

entitled to a credit of $20,550 in his opening net worth for suits bought from Goodman; and (3) Whether the $20,000 in bonds belong to appellant or to his mother. (Appellee's Brief p. 4.) Despite this concession, the Government argues the sufficiency of the evidence without discussing the evidence as to these three matters.

On page 20 the Government argues as follows:

> "Moreover, the Goodman deals, considered in conjunction with appellant's addiction to the use of cash and cashier's checks (R. 1154-1162) and his previous difficulties with the O.P.A. (R. 553-558), indicated a probable black market source for the unreported income. Cf. *United States v. Chapman,* 168 F.2d 997, 1000 * * *"[2]

The validity of the Goodman transaction was fully established by the Government's own witness. Louis Leavy testified to the entire transaction (R. 190-196); the Government introduced the cashier's checks, payable to Goodman, in the sum of $20,550. Defendant's Exhibit AL (see Appendix, Opening Brief p. 34) traces the entire transaction from the purchasing of the checks to the end. There is nothing in the record to warrant the assumption that appellant was engaged in any black market transaction with Goodman or with Leavy.

The reference to previous difficulties with the O.P.A. refers to a consent judgment for the issuance of an injunction (R. 558) prohibiting the sale of sailor suits in violation of the price established by law. The complaint had

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[2]In *U. S. v. Chapman,* the proof consisted of the testimony of witnesses that the defendant was engaged in black market transactions. There is no such evidence in the instant case.

been filed on November 15, 1943. The decree was entered by stipulation wherein it was recited that defendant Olender claimed any violations were unintentional. (R. 556.) There was no evidence that the injunction had ever been violated. The presumption of innocence applies and it must be presumed that Olender obeyed the injunction.

In footnote 14 the Government states "His (Olender's) personal bank account was relatively inactive and he always carried at least $1,000 in his pocket." The prosecutor argued this point to the jury (R. 1324) to the effect that there was something fishy about the whole business because his personal bank account was very inactive and did not show the payment of ordinary current personal expenses. However, the books of Olender's business were introduced in evidence. (Defendant's Exhibits H to L.) These showed that throughout the times involved practically all personal living expenses were drawn on the business account and charged to Olender's personal account, including such items as laundry, cleaner, creamery, gas and electric, auto license, lodge dues, telephone, flowers, life insurance, charitable donations, etc., etc.

Following the foregoing, the Government's brief merely contains a statement of ultimate figures without discussing how or in what manner they were arrived at. In fact, the Government's entire argument as to the sufficiency of the evidence only occupies three pages of its brief.

THE COURT ERRED IN ADMITTING IN EVIDENCE THE FILE RELATING TO MRS. FOOTE'S APPLICATION FOR AN OLD AGE PENSION.

The Government admits that this file was hearsay (Appellee's Brief p. 23), but seeks to justify its admission on the ground that it was an official record kept in the regular course of business and that appellant did not raise the question of privilege at his trial. We know of no law that permits the introduction of hearsay testimony merely because it is contained in an official record. As pointed out on page 80 of our opening brief, this file, in addition to the affidavit of appellant's wife, contained reports of investigators for the Welfare Department, reports from banks relative to lack of deposits from Laura Foote, affidavits of Laura Foote showing no personal property in excess of $500, etc. The introduction of these documents constituted the rankest of hearsay and prevented appellant from cross-examining any of the makers thereof. (*Hanfelt v. United States* (8 Cir.), 253 Fed. (2d) 811.)

The fact that certain documents are found in a file of some public official or agency does not make such documents admissible under the public record rule. This question was recently before the California Appellate Court in the case of *Pruett v. Burr* (decided May 27, 1953), 118 A.C.A. 217, which involved documents found in the custody of a public officer. The California Appellate Court at page 229 states:

> "In *Everts v. Matteson,* 68 Cal.App.2d 577 (157 P. 2d 651), it was held that a communication from a person who had been employed to appraise realty was not a corporate record, under Civil Code, section 371,

nor was it admissible in evidence merely because the employer had it among his papers.

In *City of Stockton v. Vote,* 76 Cal. App. 369, 396 (244 P. 609), it is said: 'No section of the Political Code relating to the department of public works has been called to our attention that would make the report by a subordinate officer or field officer to his superior, or whatever designation may be applicable to the position occupied by Mr. Barnes, a public document admissible in evidence in controversies between independent parties. These considerations show the opinions and statements of Mr. Barnes to be mere hearsay so far as this case is concerned and wholly inadmissible.'

In 20 American Jurisprudence, page 866, section 1027, it is remarked that: '* * * a record of a primary fact made by a public official in the performance of official duty is, or may be made by legislation, competent prima facie evidence as to the existence of that fact, but records of investigations and inquiries conducted either voluntarily or pursuant to requirement of law by public officers concerning causes and effects, and involving the exercise of judgment and discretion, expressions of opinion, and the making of conclusions, are not admissible in evidence as public records.' ''

In discussing the Uniform Business Records Act, the California Court at page 230 stated:

"We do not believe that it was the intent of the act to make all correspondence received by a businessman admissible in evidence merely because it might pertain to his business. If this were so, any written hearsay evidence concerning business matters would be competent evidence."

In answering our contention that the affidavit of appellant's wife was improperly admitted, the Government urges that appellant did not raise the question of "privilege" at his trial. The question of "privilege" is not involved. The question involved is one of disability and competency. Under the federal law a wife is not competent to testify against her husband in a criminal case. The Government refers to Section 604 of Volume 2 of Wigmore on Evidence in support of the statement that "hearsay statements of a wife, admissible under a recognized exception to the hearsay rule, are not limited by the privilege". Just what the Government means by this language does not appear in its brief. There was no question of "privilege" involved. Said Section 604 reads in part as follows:

> "The doctrine of *waiver* applies exclusively to privilege, a disability cannot be waived. One spouse, therefore, cannot by any attempted waiver be enabled to call for the favoring testimony of another."[1]

But whether the disability of a wife to testify against her husband falls under the heading of incompetency or privilege is immaterial. Appellant did not waive any objection to the introduction of his wife's affidavit in evidence.

When the file was first offered, the prosecutor stated that it contained the affidavit of appellant's wife and that

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[1]Professor Wigmore wrote the foregoing before the Supreme Court held that a wife was competent to testify as a witness for her husband but the Section shows that the relationship of husband and wife renders one incompetent to be a witness against the other in a criminal case.

it was offered to impeach appellant's testimony that gifts were made to appellant and his wife jointly. (R. 1122.) There was thus before the Court the direct statement of the prosecutor that the Government was offering and going to rely upon incompetent testimony. Appellant objected on the grounds that the whole matter was hearsay and the Court should have sustained the objection.

In the case of *New England etc. Co. v. Bonner* (2 Cir.), 68 Fed. (2d) 880, 881, the Court said:

> "The rule of practice in the federal courts requiring a specific statement of the grounds of objection to the admission of testimony is not to be so applied as to require redundancy. Objections of the kind taken here are sufficient where the ground therefor is so manifest that the trial court and counsel cannot fail to understand it. *Grandison v. Robertson* (C.C.A.) 231 F. 785; *Safford v. United States* (C.C.A.) 233 F. 495."

As the Government could not call Betty Olender to testify against her husband, they could not rely on a hearsay affidavit made by appellant's wife. The Government could not indirectly do that which the law prohibited it from doing directly. (70 *C. J.*, p. 140, Sec. 170, and cases cited.)

The Government attempts to distinguish the case of *United States v. Caserta,* 199 Fed. (2d) 905, upon which appellant relies by stating that Caserta objected to the use of his own confidential file whereas in the instant case Mrs. Foote was dead. The fact that Mrs. Foote was dead cannot justify the admission in evidence of her hearsay statements and declarations.

The admission of the entire file was most prejudicial to appellant. As was so often stated throughout the trial, the guilt or innocence of appellant depended upon the credibility the jury would accord to his testimony. Anything the Government offered to destroy appellant's credibility before the jury must have operated to his great prejudice. If this file had been excluded from evidence the Government could not have based its arguments thereon that appellant was a liar and unworthy of belief and the jury may have given far greater credence to appellant's testimony with the result that a different verdict may have been returned to the Court.

THE COURT ERRED IN INSTRUCTING THE JURY IT COULD CONSIDER APPELLANT'S FAILURE TO EXPLAIN DISCREPANCIES BETWEEN ACTUAL AND REPORTED INCOME.

This matter was argued by us on pages 95 and 96 of our opening brief. The Government seeks to uphold the giving of this erroneous instruction by quoting from the opinion in *Bell v. United States,* 185 Fed. (2d) 302, 309, where the same language as used in the complained of instruction is found in the opinion of the Court.

The Government is in error in assuming that because language appears in a Court's decision, it is proper to incorporate such language in an instruction to the jury. The rule in this regard was early stated by the California Supreme Court in the case of *Davis v. Hearst,* 160 Cal. 143, 195, 116 P. 530, as follows:

> "In the Dauphiny case it is pointed out that 'it is always injudicious to take the language of a court,

in discussing a proposition of law, as correct instruction to be given to a jury.' This is necessarily so, for it is always proper and frequently imperative upon a court of review, in answering arguments pro and con, itself to indulge in argumentative discussion, which is appropriate to the question under consideration, but has no place in an instruction to a jury."

See, also:

People v. Darnell, 107 Cal. App. (2d) 541, 549, 237 P. (2d) 525.

The foregoing rules are fully applicable to the question now presented. In the *Bell* case the Court's opinion was an argument dealing with the sufficiency of the evidence and the same is true of the other two cases cited by the Government on page 32 of its brief. As an argument it may be sound but as an instruction to the jury it is error. The mere fact that *discrepancies are indicated* by the Government's proof neither shifts the burden of proof nor the burden of going forward to the appellant. If all that the Government's case established was an indication of discrepancies, then the Government failed to carry its burden of proof and appellant was entitled to a judgment of acquittal.

The fact that the Court instructed the jury that the burden of proof rested on the Government cannot cure the error for, by the given instruction, the Court in effect told the jury if discrepancies between appellant's returns and his actual income were merely indicated by the Government's proof and unexplained by appellant, that this justified the jury in finding that the burden of proof had

been fully sustained by the Government. Pertinent language will be found in the case of *Bihn v. United States,* 328 U.S. 633, 637, 90 L.Ed. 1484, 1488, as follows:

> "Or to put the matter another way, the instruction may be read as telling the jurors that, if petitioner by her testimony had not convinced them that someone else had stolen the ration coupons, she must have done so. So read, the instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused of crime."

So, here, the jury were in effect told that if such discrepancies were merely indicated by the Government's proof and unexplained by the appellant, the jury would be justified in finding the appellant guilty.

THE COURT ERRED IN ADMITTING THE TESTIMONY OF THE WITNESS RINGO.

The Government's statement of the facts relating to this problem (pp. 26-7) is not accurate. A correct summary of the evidence involved in this point is set forth in our opening brief at page 89.

The Government states that Ringo talked to Agent Root and was given a number of items on which Root wanted some explanation and pages 123 and 1176 of the record are cited in support of this statement. On page 123 Ringo testified that Mr. Root merely wanted the Goodman transactions and on page 1176 Mr. Root testified that he told Ringo that he wanted to know about the Goodman trans-

actions. Nothing on these pages shows that Root gave Ringo "a number of items on which Root wanted some explanation".

The Government then states that Ringo wrote out a series of questions on the particular items which Root wanted explained and reference is made to pages 248, 253 and 1176-7 of the record. There is nothing on the cited pages to support this statement. It is true that Ringo testified that he asked Olender to submit to him figures as to his net worth. (R. 117.)

Appellee contends that the relationship of attorney and client never existed between Ringo and appellant. The facts as stated on page 27 of its brief do not correctly present the situation. Olender testified that he went to his banker and wished to get an accountant who was also a tax attorney (R. 423); that Reinhard said he knew such a man and referred him to the Sargent firm, of which one member was a tax attorney and an accountant (R. 423-4); that when he appeared at the office, the name of Charles Ringo, attorney at law, was painted on the door; that he had a conversation with Ringo; that he told Ringo he wanted an attorney as well as an accountant and as such he had certain information that he desired to give him; that he retained Ringo and carried on with him all of his tax matters; that the reason he wanted an attorney and an accountant combined was that in his net worth statement there were many items he didn't wish disclosed. (R. 425-6.)

Mr. Ringo testified that he was an attorney and an accountant; that his business card read "CPA, attorney-

at-law'' (R. 116); that Olender first asked him if he was an attorney-at-law and that he wanted an attorney-at-law who knew something about accounting; that after he had told appellant he was an attorney and knew both subjects, that appellant retained him (R. 116); that he was a specialist in tax matters and he was employed to look into Olender's tax problems (R. 118).

The Government in footnote 19 merely states that appellant testified that he hired Ringo because he wanted an attorney and omits all other evidence on the subject. Appellant's testimony as to his retaining Ringo is fully corroborated by the testimony of Reinhard and Ringo.

The Government contends that Ringo performed merely an accountant's function; such is not the case. While the preparation of the net worth statement may be classified as an accountant's function, it does not follow that the information given by Olender to Ringo is free of the attorney-client relationship and privilege. For example:

A man has acquired money and funds in violation of criminal statutes. He has filed a yearly return omitting such amounts. Later he desires to file an amended return including such amounts and employs an attorney-accountant to advise him and to do the same upon the understanding that his explanation to the attorney as to the illegal manner in which he acquired the money is to remain confidential. An amended return is so prepared. Clearly the lawyer-accountant can testify as to the preparation of the return and that he acquired the figures from his client but he cannot disclose the confidential communications made to him as to the manner in which the client obtained the money.

So, in the instant case, Ringo could testify to preparing the net worth statement and that the information was acquired from Olender, but the confidential communications made by Olender to Ringo as to the sources of the income or the manner in which it was acquired could not be testified to by Ringo over the objection of appellant.

The Government seeks to argue that because Monroe Friedman was consulted at later stages of the proceedings, this indicates Ringo was only hired as an accountant and not as a lawyer. A man may have two lawyers. The record shows that the bringing in of Mr. Friedman was due to the fact that a dispute arose between Ringo and appellant as to the omission of certain items from the net worth statement. Mr. Friedman was called in as an arbitrator of this question.

On pages 29 and 30 the Government relies on certain cases, each of which is clearly distinguishable from the case at bar.

In *Banks v. United States,* 204 Fed. (2d) 666, the facts show that O'Gordon, the lawyer-accountant, discussed certain matters with the Bureau of Internal Revenue and the Revenue Officer submitted a list of questions to which he requested answers. O'Gordon procured these answers from his client and delivered the same to the revenue agent. O'Gordon was acting as the defense agent under a power of attorney and the questions and answers were made with knowledge that they were to be delivered to the Government. The Court held that as O'Gordon was acting under a power of attorney and that his client furnished the information for the purpose of its being given

to the revenue agent, that the claim of privilege could not be sustained.

In the instant case Ringo was not acting under any power of attorney nor as the agent of Olender for the purpose of transmitting to the Government any communications made by Olender to Ringo, save and except the net worth statement.

Pollock v. United States, 202 Fed. (2d) 281, and *United States v. DeVasto,* 52 Fed. (2d) 26, were cases where the attorney was merely acting as a scrivener for the preparation of deeds transferring property. The Court held that under such circumstances the attorney was not acting in his professional capacity; that the matters were those which were to be made public and not kept private, and furthermore that the transference of the property in each case was part of a criminal conspiracy.

Grant v. United States, 227 U.S. 74, was a contempt proceeding. Corporate records had been turned over to an attorney who refused to produce them in response to a subpoena. The Court held that as the documents were corporate records, they were not confidential communications and therefore the lawyer could not legally refuse to obey the subpoena.

In *United States v. Chin Lim Mow,* 12 F.R.D. 433, a subpoena *duces tecum* had been issued to an attorney to produce certain bank accounts. The evidence showed that the attorney was not acting in his professional capacity but merely as a trustee for the handling of the bank account, the making of deposits and withdrawals.

The Government has failed to cite one case that meets the situation now presented. Here Ringo was employed as an attorney upon the understanding that the information as to the items to be contained in the net worth statement were to be held in confidence.

THE COURT ERRED IN ADMITTING IN EVIDENCE GOVERNMENT'S EXHIBIT 45.

Appellee's sole argument in support of the Court's ruling admitting United States Exhibit 45 in evidence is as follows (pp. 30-31):

> "Appellant also contends (Br. 87-88) that no proper foundation was laid for the admission of U. S. Exhibit 45, the series of questions propounded by Ringo to appellant, in that it was identified only by Agent Whiteside who said he obtained it from Ringo. However, the existence of the document had just previously been developed by defense counsel in cross-examination of Whiteside (R. 248-253), and defense counsel later introduced as their own a portion of the exhibit not used by the Government. (R. 1169-1172.)"

This document had been given to Whiteside by Ringo. Ringo never identified it in any manner. It was Ringo's statement to Whiteside that the questions thereon had been answered by appellant.

On cross-examination of the Government's witness Whiteside he was being questioned as to whether he used the figures in Monroe Friedman's affidavit in making his

computations. (R. 247.) Whiteside answered: "Mr. Olender gave to Ringo a statement showing cash on hand as of the beginning of this period and how it was disposed" (R. 248),[3] and then stated that Ringo told him he had outlined a series of questions for Olender, among them being how the cash was disposed, that Olender answered in his handwriting by stating at the end of '44 he had $50,000 left (R. 248-9). On *redirect examination* by the Government, Whiteside testified that Ringo had given him the copy of such document. (R. 250.) Item 19 was then admitted in evidence over the objections of appellant. (R. 252.)

Long after the portion of the document had been so admitted in evidence and when Agent Root was being cross-examined, appellant sought to show that certain data contained therein was not supplied by Olender but was in fact given to Ringo by Root (this was to refute Whiteside's testimony that all answers were given by Olender in his handwriting). Root answered that he had given that information to Ringo (R. 1170), whereupon appellant offered in evidence that portion which Root said he had given Ringo.

The foregoing presents an entirely different situation from the one presented in the Government's brief. Appellant's offer was to establish certain facts that had been ascertained by Agent Root and not to adopt any portion of the exhibit as being the statements of Olender.

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[3]Appellant moved to strike out the answer of Whiteside. The Court denied the motion. (R. 248.)

Item 19 of the exhibit was never identified as being the writing or statement of appellant.

Dated, San Francisco, California,
October 26, 1953.

Respectfully submitted,
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